91-744

No. 91-____

Supreme Court, U.S.
FILED
NOV 7 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,

Petitioners,

—v.—

ROBERT P. CASEY, N. MARK RICHARDS, and ERNEST D. PREATE, JR., personally and in their official capacities,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

KATHRYN KOLBERT
(*Counsel of Record*)
JANET BENSHOOF
LYNN M. PALTROW
RACHAEL N. PINE
American Civil Liberties Union Foundation
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

LINDA J. WHARTON
SETH KREIMER
Women's Law Project
125 South Ninth Street
Suite 401
Philadelphia, PA 19105
(215) 928-9801

THOMAS E. ZEMAITIS
Pepper, Hamilton & Scheetz
3000 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4361

ROGER K. EVANS
Planned Parenthood Federation of America, Inc.
810 Seventh Avenue
New York, NY 10019
(212) 541-7800

Attorneys for Petitioners

QUESTION PRESENTED

1. Has the Supreme Court overruled *Roe v. Wade*, 410 U.S. 113 (1973), holding that a woman's right to choose abortion is a fundamental right protected by the United States Constitution?

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are set forth in the caption on the cover of this petition.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT ... 5

I. THIS CASE PRESENTS ISSUES OF GRAVE PUBLIC IMPORTANCE 6

II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH PRECEDENTS OF THIS COURT AND WITH DECISIONS OF OTHER COURTS OF APPEALS 10

CONCLUSION 14

APPENDIX

Planned Parenthood v. Casey, No. 90-1662 (3rd Cir. Oct. 21, 1991) 1a

Planned Parenthood v. Casey, 744 F. Supp. 1323 (E.D. Pa. 1990) 104a

18 Pa. Cons. Stat. Ann. § 3203 (1983 and Supp. 1991) 289a

PAGE

18 Pa. Cons. Stat. Ann. § 3205 (1983 and Supp. 1991) 289a

18 Pa. Cons. Stat. Ann. § 3206 (1983 and Supp. 1991) 292a

18 Pa. Cons. Stat. Ann. § 3207(b) (1983 and Supp. 1991)..... 298a

18 Pa. Cons. Stat. Ann. § 3208 (1983 and Supp. 1991) 298a

18 Pa. Cons. Stat. Ann. § 3209 (1983 and Supp. 1991) 300a

18 Pa. Cons. Stat. Ann. § 3214(a) (1983 and Supp. 1991)..... 302a

18 Pa. Cons. Stat. Ann. § 3214(f) (1983 and Supp. 1991)..... 304a

TABLE OF AUTHORITIES

Cases	PAGE
Arnold v. Bd. of Educ., 880 F.2d 305 (11th Cir. 1989)	11
Barnes v. Moore, No. J91-0245(W) (S.D. Miss. Aug. 30, 1991), *appeal docketed*, No. 91-1953 (5th Cir.)	12
Bellotti v. Baird, 443 U.S. 622 (1979)	4
Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)	7
City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)	4, 5, 10
Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974)	7
Fargo Women's Health Org. v. Sinner, No. A3-91-95 (D.N.D. Aug. 23, 1991)	12
Florida Women's Medical Clinic, Inc. v. Smith, 746 F. Supp. 89 (S.D. Fla. 1990)	12
Glick v. McKay, 937 F.2d 434 (9th Cir. 1991)	11
Griswold v. Connecticut, 381 U.S. 479 (1965)	7
Guam Society of Obstetricians & Gynecologists v. Ada, No. 90-00013 (D. Guam Aug. 23, 1990), *appeal docketed*, No. 90-16706 (9th Cir.)	12
Hodgson v. Minnesota, 110 S. Ct. 2926 (1990)	4, 9, 10, 11

PAGE

Hutto v. Davis, 454 U.S. 370 (1982) 9

In re Mary P., 444 N.Y.S.2d 545 (N.Y. Fam. Ct. 1981) 8

In re Quinlan, 355 A.2d 647 (1976) 7

Marks v. United States, 430 U.S. 188 (1977).. 4, 9

Massachusetts v. Secretary of Health & Human Servs., 899 F.2d 53 (1st Cir. 1990) (*en banc*), *vacated and remanded on other grounds*, 111 S. Ct. 2252 (1991) 11

Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990) 11

Palko v. Connecticut, 302 U.S. 319 (1937) 6

People v. Pointer, 151 Cal. App. 3d 1128 (Ca. Ct. App. 1984) 8

Planned Parenthood Fed'n of America v. Sullivan, 913 F.2d 1492 (10th Cir. 1990), *vacated and remanded on other grounds*, 111 S. Ct. 2252 (1991) 11

Ragsdale v. Turnock, 941 F.2d 501 (7th Cir. 1991) 11

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 9

Roe v. Wade, 410 U.S. 113 (1973) .....*passim*

Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1978) 7

PAGE

Rust v. Sullivan, 111 S. Ct. 1759 (1991)..... 11

Snyder v. Massachusetts, 291 U.S. 97 (1934).. 6

Sojourner T. v. Roemer, No. 91-2247 (E.D. La. Aug. 7, 1991), *appeal docketed*, No. 91-3677 (5th Cir.)..... 11

Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (1977)..... 8

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986).....4, 5, 10

Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).....4, 9, 10, 12

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)..... 8

Whalen v. Roe, 429 U.S. 589 (1977)..... 7

Zablocki v. Redhail, 434 U.S. 374 (1978)..... 7

Statutes

18 Pa. Cons. Stat. Ann. § 3203 (1983 and Supp. 1991)..... 2, 3

18 Pa. Cons. Stat. Ann. § 3205 (1983 and Supp. 1991)..... 2, 3

18 Pa. Cons. Stat. Ann. § 3206 (1983 and Supp. 1991).....2, 3, 4

18 Pa. Cons. Stat. Ann. § 3207(b) (1983 and Supp. 1991)..... 2, 3

PAGE

18 Pa. Cons. Stat. Ann. § 3208 (1983 and Supp. 1991) 2, 3

18 Pa. Cons. Stat. Ann. § 3209 (1983 and Supp. 1991) 2, 3, 5

18 Pa. Cons. Stat. Ann. § 3214(a) (1983 and Supp. 1991) 2, 3

18 Pa. Cons. Stat. Ann. § 3214(f) (1983 and Supp. 1991) 2, 3

28 U.S.C. 1254(1) (1988) 2, 3

Sup. Ct. R. 10.1(a) 6

Sup. Ct. R. 10.1(c) 6

Other Authorities

Nancy Binkin, Julian Gold and Willard Cates, Jr., *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Fam. Plan. Persp. 163 (1982) 6

Brief *Amici Curiae* of the National Abortion Federation and Planned Parenthood Federation of America, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (pending in this Court) 13

Willard Cates, Jr., and Robert W. Rochat, *Illegal Abortions in the United States: 1972-74*, 8 Fam. Plan. Persp. 86 (1976) 6

Adrienne Germain, *The Christopher Tietze International Symposium: An Overview* in *Int'l J. of Gynecology & Obstetrics Supplement 3* (1989) 7

PAGE

Mimi Hall, *Abortion fight swings back to capital*, USA Today, July 1, 1991 12

Lawrence Lader, *Abortion* (1966) 6

Maralee Schwartz, *Abortion Veto Is Overridden In Louisiana*, Washington Post, June 19, 1991 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-_____

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,

Petitioners,

—v—

ROBERT P. CASEY, N. MARK RICHARDS, and ERNEST D. PREATE, JR., personally and in their official capacities,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Third Circuit entered on October 21, 1991.

OPINIONS BELOW

The opinion of the district court was issued on August 23, 1990, and is reported at 744 F. Supp. 1323 (E.D. Pa. 1990). (104a-288a). A panel of the United States Court of Appeals for the Third Circuit issued its decision on October 21, 1991. (1a-103a).[1]

JURISDICTION

The final judgment of the court of appeals was entered on October 21, 1991. Jurisdiction is proper pursuant to 28 U.S.C. 1254(1) (1988), which provides for review by certiorari "upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATUTES INVOLVED

The 1988 and 1989 Amendments to the Pennsylvania Abortion Control Act of 1982, 18 Pa. Cons. Stat. Ann. §§ 3203 (definition of medical emergency), 3205, 3206, 3207(b), 3208, 3209, 3214(a) and (f) (1983 and Supp. 1991). (289a-304a).

STATEMENT OF THE CASE

Petitioners in this Court, five health facilities and one physician representing a class of physicians, provide women in Pennsylvania with a wide range of reproductive health services, including abortion.

---

1 The opinions and statutes involved are reprinted in the Appendix to this Petition for Writ of Certiorari. Citations to this Appendix are made to the page number therein as "(____a)."

They challenge the constitutionality of the 1988 and 1989 amendments to Pennsylvania's Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3201-3220 (1983 and Supp. 1991), on their own behalf and on behalf of the women they serve.

Specifically, Petitioners challenge the provisions of the Act mandating that physicians deter women from obtaining abortions by providing a prescribed litany of state-approved information and by delaying the abortion procedure at least twenty-four hours after this recitation, 18 Pa. Cons. Stat. Ann. §§ 3205, 3208 (289a-292a, 298a-300a); the requirement that young women obtain consent of one parent or a court order prior to obtaining an abortion, and that both the young women and their parents obtain the state mandated information discouraging abortion, 18 Pa. Cons. Stat. Ann. § 3206 (292a-297a); the requirement that married women notify their husbands of their abortion decision, 18 Pa. Cons. Stat. Ann. § 3209 (300a-302a); and the required public disclosure of certain reports as well as the collection of detailed and particularized information for every abortion performed, 18 Pa. Cons. Stat. Ann. §§ 3207(b), 3214(a) and (f) (298a, 302a-304a). Moreover, Petitioners challenge the definition of medical emergency that exempts physicians from compliance with the Act only in those extremely limited cases in which an immediate abortion is necessary to avert a woman's death or when a delay will create serious risk of substantial and irreversible impairment of a major bodily function, 18 Pa. Cons. Stat. Ann. § 3203 (289a).

After a three-day bench trial, at which expert witnesses for both Petitioners and the Commonwealth testified, the district court issued its opinion and

order on August 24, 1990, enjoining virtually all of the challenged provisions. (104a-288a). The district court measured the constitutionality of the Act under *Roe v. Wade*, 410 U.S. 113 (1973), *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). Notwithstanding the Commonwealth's arguments to the contrary, the district court explicitly found that neither *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), nor *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), modified the strict scrutiny standard of *Roe* for adult women. (231a-233a). The district court found, however, that a long line of this Court's decisions, beginning with *Bellotti v. Baird*, 443 U.S. 622, 640 (1979), and including *Hodgson*, required that the constitutionality of the parental informed consent requirement of the Act, 18 Pa. Cons. Stat. Ann. § 3206, be judged by the more lenient "undue burden" test. Nevertheless, the district court found, based on the evidence presented in this case, that requiring parents to visit the abortion facility to obtain the state-mandated materials discouraging abortion was unconstitutional even under this standard. (251a-252a). The Commonwealth defendants appealed.

On October 21, 1991, after briefing and oral argument, the United States Court of Appeals for the Third Circuit reversed the district court's judgment, finding that *Roe*, *Akron*, and *Thornburgh* are no longer the law of the land and that women no longer possess a fundamental constitutional right to choose abortion. (30a). Applying *Marks v. United States*, 430 U.S. 188 (1977), the court of appeals took the unusual step of construing *Webster* and *Hodgson* to

establish a new standard of review by which to judge the constitutionality of all abortion restrictions—Justice O'Connor's "undue burden" analysis, first set forth in her dissenting opinions in *Akron* and *Thornburgh*. *Akron*, 462 U.S. at 453, 461-64 (O'Connor., J., dissenting); *Thornburgh*, 476 U.S. 828-29 (O'Connor, J., dissenting).

Rather than remanding the case so that the district court could take any additional testimony relevant to this new "undue burden" standard and then apply that standard, the court of appeals upheld all of the challenged provisions, except the husband notification requirement. This ruling flatly contradicts this Court's express holdings in *Akron* and *Thornburgh*, where identical provisions were found unconstitutional under *Roe*. This petition for certiorari seeks review of the court of appeals judgment that overrules *Roe* and establishes the "undue burden" test as the new standard of review.[2]

REASONS FOR GRANTING THE WRIT

There are few cases that better meet the standards for the granting of a writ of certiorari. As this Court's rules establish, a review on writ of certiorari will be granted when the case presents matters of public importance requiring the supervisory powers of the Court, or when a United States court of appeals has decided a federal question in a way that

---

2 Because Petitioners believe that the court of appeals erred in applying a standard of review never before sanctioned by a majority of this Court, Petitioners challenge each of the holdings of the court of appeals regarding the specific provisions of the Act, except the holding that the husband notification provision of § 3209 is unconstitutional.

conflicts with applicable decisions of this Court or with the decisions of other courts of appeals. Sup. Ct. R. 10.1(a), (c).

I. THIS CASE PRESENTS ISSUES OF GRAVE PUBLIC IMPORTANCE.

Roe v. Wade, 410 U.S. 113 (1973), recognized that the right to decide whether or not to have a child is a fundamental right guaranteed by the Constitution of the United States. *Id.* at 152-53.[3] The advent of safe and legal abortion guaranteed in *Roe* has allowed millions of American women to escape the specter of illegal abortions and the health risks associated with forced pregnancies that had threatened the lives of countless women before them.[4] At the

---

3 By designating childbearing decisions as worthy of fundamental constitutional protection, this Court recognized that these rights are "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and are "rooted in the traditions and conscience of our people." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Accordingly, government may interfere with them only in those limited and rare instances when it can demonstrate a compelling purpose and where the regulation is narrowly tailored to achieve that purpose.

4 Before *Roe*, "between 200,000 and 1.2 million illegally induced abortions occurr[ed] annually in the United States." Willard Cates, Jr., and Robert W. Rochat, *Illegal Abortions in the United States: 1972-74*, 8 Fam. Plan. Persp. 86, 92 (1976) (footnote omitted). As a result of these back-alley and self-induced abortions, as many as 5,000 to 10,000 women died per year and many other women suffered severe physical and psychological injury. *See* Lawrence Lader, *Abortion* 3 (1966); Cates & Rochat, *supra*, at 86-92; *see also* Nancy Binkin, Julian Gold and Willard Cates, Jr., *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Fam. Plan. Persp. 163,

same time, women have been freed from the life-long impact of caring for unwanted children and the stigma of unwed motherhood, enabling them to enter the work force, continue their education, and otherwise make meaningful decisions with dignity and equality, consistent with their own personal goals. *Cf. Roe*, 410 U.S. at 153.

Additionally, because it establishes that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment," *see Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632, 639-40 (1974), *Roe* has defined the contours of privacy that protect an individual from unwarranted governmental interference in private affairs and has been the foundation upon which numerous other freedoms are built. For example, courts' recognition of the right to use contraception, *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-86, 688-89 (1977), *see also Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to marry, *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); the right to be free from overly restrictive maternity leave regulations, *La Fleur*, 414 U.S. at 639-40; the right to informational privacy, *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); the right to be free from forced sterilization, *Ruby v. Massey*, 452 F. Supp. 361, 366 (D. Conn. 1978); the

---

166 (1982) (*Roe* resulted in a dramatic decline in deaths due to illegal abortion). These statistics are comparable to those in countries where abortion remains illegal. Adrienne Germain, *The Christopher Tietze International Symposium: An Overview* in *Int'l J. of Gynecology & Obstetrics Supplement 3* at 1 (1989) (estimating that "200,000 or more Third World women die needlessly each year due to botched abortions.").

right of bodily integrity, *In re Quinlan*, 355 A.2d 647, 663 (1976); *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 424 (1977); and the right to be free from court-ordered contraception, *People v. Pointer*, 151 Cal. App. 3d 1128, 1139 (Ct. App. 1984), or court-ordered abortion, *In re Mary P.*, 444 N.Y.S.2d 545, 546-47 (N.Y. Fam. Ct. 1981), have all relied upon this Court's decision in *Roe*.[5] When the bedrock principle of *Roe* is undermined or overruled, these related rights of privacy are no longer secure.

Perhaps more than any other Supreme Court precedent, *Roe* and its progeny have permitted American women to participate fully and equally in society. Consistent with a long-standing American tradition that places moral decisionmaking in the hands of the individual, rather than the government, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), *Roe* has enabled women to make life choices guided by their own religious and conscientious beliefs. For these reasons, opposition to *Roe* has taken on symbolic meaning and importance well beyond the decision's holding.

The court of appeals found that women no longer enjoy fundamental constitutional protection for the right to choose abortion. Rather than measure the constitutionality of the Pennsylvania law under the strict scrutiny test of *Roe*, the court of appeals created a new, more lenient standard to measure the constitutionality of abortion laws and then applied this standard to uphold restrictions that this Court had recently held unconstitutional under *Roe*. To

---

5 In the two decades since *Roe* was decided, federal and state courts have cited the decision in more than 3,500 cases.

permit the decision of the court of appeals to remain intact without review by this Court would violate one of this Court's central tenets: only this Court may overrule one of its own decisions. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). This Court has cautioned that "unless we wish anarchy to prevail within the federal judicial system, a precedent of [the Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982). As this Court has further explained, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484.[6]

---

6 Moreover, the court of appeals' reading of *Webster* and *Hodgson* is implausible. In *Webster*, rather than adopting the "undue burden" test, Justice O'Connor takes pains to demonstrate that the Missouri viability testing provisions "do not . . . conflict with any of the Court's past decisions concerning state regulation of abortion," 492 U.S. at 525, and that these requirements are therefore consistent with *Roe*. *Id.* at 526-30. In addition, the court of appeals inappropriately applied the standard set forth in *Marks v. United States*, 430 U.S. 188 (1977), when finding that *Hodgson* established a new standard of review for all abortion regulations. Five members of the *Hodgson* Court found that the Minnesota restrictions were unconstitutional because they interfered with constitutionally protected "family[ ] decisionmaking processes," 110 S. Ct. at 2950 (O'Connor, J., concurring), and that the Minnesota scheme failed to pass even a rational basis test, the lowest level of scrutiny. *Id.* at 2945-47. Even when upholding the portion of the statute with a court bypass procedure, the Court went out of its way to make clear that the *Hodgson* ruling was consistent with a line of Supreme Court precedent, dating back to

At no time in our nation's history has this Court overruled a decision establishing fundamental constitutional protection for individual liberty. Should this Court permit the unprecedented decision of the court of appeals to take effect without review, American women will lose the rights they now hold dear and will once again be subject to the vicissitudes of state control over reproductive decisions.

II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH PRECEDENTS OF THIS COURT AND WITH DECISIONS OF OTHER COURTS OF APPEALS.

Roe v. Wade was decided in 1973, explicitly reaffirmed by this Court in both *Akron*, 462 U.S. 416, 420 (1983), and *Thornburgh*, 476 U.S. 747, 759 (1986), and remains the law of the land today. Indeed, the members of this Court were in unanimous agreement in *Webster* on only one point: that *Roe* had not been overturned in that case. 492 U.S. at 521 (plurality) ("[t]his case therefore affords us no occasion to revisit the holding of *Roe* . . . and we leave it undisturbed"); *id.* at 525 (O'Connor, J., concurring) ("there is no necessity to accept the State's invitation to reexamine the constitutional validity of *Roe v. Wade*"); *id.* at 532 (Scalia, J., concurring) (chastising colleagues for refusing to take that step); *id.* at 537 (Blackmun, J., concurring in part and dissenting in part) ("the Court extricates itself from

---

1976, that has permitted greater interference with the rights of young women because of the significant state interest at stake. *Id.* at 2950-51 (O'Connor, J., concurring); *id.* at 2970 (Kennedy, J., concurring in part and dissenting in part) (plurality).

this case without making a single, even incremental, change in the law of abortion").

Moreover, in none of its three most recent decisions involving the right of reproductive privacy did this Court overrule *Roe* or expressly abandon the application of *Roe*'s principles in *Akron* and *Thornburgh*. To the contrary, in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), this Court relied heavily on its analysis in *Akron* and *Thornburgh* when distinguishing the regulations challenged in *Rust* from the statutes invalidated in both prior cases. *Id.* at 1777. *See also Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2983 (1990); *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2944 n.35 (1990). The Third Circuit's holding that lower courts should no longer "apply the strict scrutiny test of *Roe*, *Akron*, and *Thornburgh* to all abortion regulations," (30a), is thus in direct contravention of this Court's rulings.

Similarly, other courts of appeals have found that neither *Webster* nor *Hodgson* establish a new standard of review by which to judge abortion regulations. *See, e.g., Ragsdale v. Turnock*, 941 F.2d 501, 505 n.1 (7th Cir. 1991); *Glick v. McKay*, 937 F.2d 434, 441 (9th Cir. 1991); *Planned Parenthood Fed'n of America v. Sullivan*, 913 F.2d 1492, 1501-02 (10th Cir. 1990), *vacated and remanded on other grounds*, 111 S. Ct. 2252 (1991); *Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53, 55 (1st Cir. 1990) (*en banc*), *vacated and remanded on other grounds*, 111 S. Ct. 2252 (1991); *Arnold v. Bd. of Educ.*, 880 F.2d 305, 311 n.6 (11th Cir. 1989).[7] The

7 Moreover, five district courts have reviewed the question and have found that neither *Webster* nor *Hodgson* modified the standard of review established in *Roe* and its progeny.

aberrational nature of the Third Circuit's opinion, which leaves women of this Circuit with a more diminished and limited federal right of privacy than the women in the rest of the nation, renders the exercise of this Court's power of supervision particularly appropriate.

Since 1989, when this Court's deeply divided decision in *Webster* failed to reaffirm *Roe* as the law of the land, legislative bodies have treated the Supreme Court's decision as "an invitation to enact abortion regulations reminiscent of the Dark Ages." *Webster*, 492 U.S. at 521. More than 600 bills restricting abortion and birth control have been introduced in state legislatures and Congress since *Webster*; most of these bills plainly violate *Roe* by establishing onerous roadblocks in the path of women seeking to choose abortion. Two states and one United States territory have gone so far as to ban abortion and even some methods of birth control.[8] Equally alarming, this Court's failure to reaffirm *Roe* has fostered extremism by opponents of abortion, who have repeatedly firebombed clinics,

---

See Sojourner T. v. Roemer, No. 91-2247, slip op. at 2-4, (E.D. La. Aug. 7, 1991), *appeal docketed*, No. 91-3677 (5th Cir.); *Florida Women's Medical Clinic, Inc. v. Smith*, 746 F. Supp. 89, 90 (S.D. Fla. 1990); *Guam Society of Obstetricians & Gynecologists v. Ada*, No. 90-00013, slip op. at 14, (D. Guam Aug. 23, 1990), *appeal docketed*, No. 90-16706 (9th Cir.); *Barnes v. Moore*, No. J910245(W), slip op. at 5, (S.D. Miss. Aug. 30, 1991), *appeal docketed*, No. 91-1953 (5th Cir.); *Fargo Women's Health Org. v. Sinner*, No. A3-91-95, slip op. at 2-3, (D.N.D. Aug. 23, 1991).

8 Mimi Hall, *Abortion fight swings back to capital*, USA Today, July 1, 1991, at 2A; Maralee Schwartz, *Abortion Veto Is Overridden In Louisiana*, Washington Post, June 19, 1991, at A4.

destroyed equipment, and physically interfered with women's ability to obtain abortions.[9]

The majority of Americans agree that this unjustifiable intrusion upon fundamental liberties must end. This Court must now decide whether women's childbearing choices are worthy of the highest level of constitutional protection. If the answer is yes, the public and this Court must ensure that all women can exercise this liberty, free of governmental interference and individual harassment. If the answer is no, American women must look elsewhere for redress.

---

9 *See generally*, Brief *Amici Curiae* of the National Abortion Federation and Planned Parenthood Federation of America at 4-18, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (pending in this Court) (documenting the "nationwide campaign of violence and intimidation aimed at preventing women from exercising their right of reproductive choice.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KATHRYN KOLBERT
(Counsel of Record)
JANET BENSHOOF
LYNN M. PALTROW
RACHAEL N. PINE
American Civil Liberties Union Foundation
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

THOMAS E. ZEMAITIS
Pepper, Hamilton & Scheetz
3000 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4361

LINDA J. WHARTON
SETH KREIMER
Women's Law Project
125 South Ninth Street
Suite 401
Philadelphia, PA 19107
(215) 928-9801

ROGER K. EVANS
Planned Parenthood Federation of America, Inc.
810 Seventh Avenue
New York, NY 10019
(212) 541-7800

Attorneys for Petitioners

Dated: November 7, 1991